

IN THE  
SUPREME COURT OF MISSOURI

No. SC84320

STATE OF MISSOURI, ex rel. S.C. MANAGEMENT, INC.

and KENNETH STONE, M.D.,

Relators,

v.

THE HONORABLE MARGARET M. NEILL, Judge of the Missouri

Circuit Court, Twenty-Second Judicial Circuit,

Respondent

BRIEF OF RESPONDENT

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### **JURISDICTIONAL STATEMENT**

Respondent concurs with the Jurisdictional Statement of Relator and admits that jurisdiction of this Court is proper.

## **STATEMENT OF FACTS**

This action for medical malpractice arises out of treatment received by plaintiff Raymond Young in July 1999 at Twin Rivers Medical Center in Dunklin County, Missouri. Exhibits A and B. Plaintiff Raymond Young<sup>1</sup> initially filed this cause in the Circuit Court of the City of St. Louis against two corporations -- defendants Tenet Healthcare Corporation (hereinafter “defendant Tenet”) and S.C. Management, Inc. (hereinafter “relator SCM”). Exhibit A.<sup>2</sup> Thereafter, plaintiff filed his First Amended Petition joining an emergency

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<sup>1</sup>Raymond Young died on March 9, 2002. Thereafter, counsel filed with the Circuit Court of the City of St. Louis a Suggestion of Death and a Motion for Leave to File a Fourth Amended Petition asserting a cause of action for wrongful death pursuant to Section 537.080 R.S.Mo. (2000). As of the date of the filing of these Suggestions, the trial court had yet to consider the request for leave to file the amended petition.

<sup>2</sup>All citations to exhibits herein are references to those exhibits filed by relators SCM and Stone in support of their Petition in Prohibition unless indicated otherwise.



department physician, Kenneth Stone, M.D., (hereinafter “relator Stone”) as an additional party defendant. Exhibit B.

A. The Parties.

Relator SCM is a Washington corporation which owns and operates Twin Rivers Medical Center. Relators’ Brief at 4. Relator SCM maintains a registered agent in St. Louis County, Missouri. Id. Defendant Tenet is a Nevada corporation which is in the business of owning and operating hospitals. Exhibit L at 120-121. Defendant Tenet does not maintain a registered agent in the State of Missouri. Exhibit F at 34. Defendant Stone is a medical doctor who plaintiff alleges negligently and carelessly provided treatment to plaintiff during treatment in the Twin Rivers Medical Center emergency room in July 1999.

A. Allegations in the Petition regarding the Propriety of Venue.

In both the initial and amended petitions, plaintiff alleged venue to be proper in the City of St. Louis pursuant to the corporation venue statute, Section 508.040 R.S.Mo. Exhibits A, B and I. Specifically, plaintiff pled:

“That defendant Tenet Healthcare Corporation is a Nevada Corporation doing business in various counties in the State of Missouri including maintaining agents for the transaction of its usual and customary business in the City of St. Louis at 3635 Vista and 6150 Oakland.”

Exhibit A, ¶2; Exhibit B, ¶2; Exhibit I, ¶2. In said petitions, plaintiff asserted that agents of defendant Tenet working at Twin Rivers Medical Center negligently and carelessly provided

medical treatment to plaintiff at that hospital. Exhibit A at 2-3; Exhibit B at 6-7; Exhibit I at 78-79. Plaintiff filed his initial petition and amended petitions before this Court issued its opinion in State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo.banc 2001) in which this Court first held that, for purposes of Section 508.010, a suit instituted by summons is “brought” whenever a plaintiff brings a defendant into lawsuit. Id.; See Linthicum, 57 S.W.3d at 858.

B. Motion for Change of Venue

After plaintiff filed his First Amended Petition, relators SCM and Stone jointly filed their Motion for Change of Venue (hereinafter “venue motion”). Exhibits E and F. On the same date, defendant Tenet filed its Special Entry of Appearance and Motion to Dismiss for Lack of Personal Jurisdiction. Exhibits C and D. In their venue motion and respective answers, relators asserted that the general venue statute – not the corporation venue statute as suggested by plaintiff in his petition – controlled the determination of venue. Exhibit E, ¶¶17, 24; Exhibit G at 70; Exhibit H, ¶15. Specifically, relators stated in their venue motion:

“Venue is also improper in the City of St. Louis because the General Venue Statute, §508.010 R.S.Mo., applies and not the corporate venue statute, §508.040 R.S.Mo.”

Id. Relators’ answers contained similar contentions. See Exhibit G at 70 and Exhibit H at 75-76.

In support of their venue motions, relators failed to file any competent evidence establishing the residence of relator Stone. See Exhibits E and F. In the venue motion,

relators alleged that relator Stone was an individual who resides in Scott County, Missouri. Exhibit E, ¶¶21, 25. In its Answer to the amended petitions, relator SCM asserted that relator Stone “is a resident of Scott County, Missouri.” Exhibit G at 70; See also Exhibit K at 88-89. In his Answers, relator Stone also claimed that he “is a resident of Scott, County, Missouri.” Exhibit H at 75; Exhibit J at 84. In contrast, relators referenced plaintiff’s petition to demonstrate the residence of relator SCM and filed an affidavit stating that defendant Tenet “does not have a registered agent in the State of Missouri.” See Exhibit E, ¶¶ 19,20 and Exhibit E at 34. Additionally, relators filed affidavits asserting that defendant Tenet did not employ individuals working at St. Louis University Hospital and Forest Park Hospital in the City of St. Louis and that individuals working at Twin Rivers Medical Center were subject to the control of relator SCM and not defendant Tenet. Id. at 34-36. In pertinent part, such affidavits also claimed that:

“Tenet Healthcare Corporation has not had any employees in the State of Missouri, made contracts in the State of Missouri, done business in the State of Missouri, owned any real estate in the State of Missouri, or had any offices for the conduct of the ordinary business in the State of Missouri.”

Id. at 35.

After extensive discovery, plaintiff filed his Suggestions in Opposition to relators’ Motion for Change of Venue and defendant Tenet’s Motion to Dismiss. Exhibit L. In such response, plaintiff asserted that the trial court determine venue under Section 508.040 and, that under such statute, venue remained proper in the City of St. Louis because defendant

Tenet maintained offices and agents for the transaction of its usual business in St. Louis City. Id. at 93-107. Following Linthicum, plaintiff filed his Supplemental Suggestions in Opposition. Exhibit M. In that pleading, plaintiff asserted venue to be correct in St. Louis City because defendant Tenet, a foreign corporation whose residence was not defined by statute, was a resident of any county in which defendant had an office or agent for the transaction of its business. Id. at 185-192. In those suggestions, plaintiff admitted that Section 508.010 governed venue in the case. Id. at 191.

Relators SCM and Stone responded, filing their Reply Memorandum. Exhibit N. In their reply, relators again asserted the impropriety of venue under the general venue statute. Id. at 207-208. In support, relators attached three additional exhibits and approximately 60 pages of deposition testimony. Exhibit O at 241-340. The evidence included an answer to interrogatory identifying relator Stone as a witness to the occurrence mentioned in the petition and providing his “last known address.” Id. at 246. Such exhibits included no evidence establishing the residence of relator Stone on either the date plaintiffs filed their initial petition or the date on which plaintiff filed his First Amended Petition joining relator Stone as a party defendant. See id. at 241-340.

A. Hearing of Motion for Change of Venue.

On November 16, 2001, the parties argued relators’ Motion for Change of Venue as well as defendant Tenet’s Motion to Dismiss. At the hearing of their motion, relators SCM and Stone presented no additional evidence with regard to the residence of relator Stone.

The Court took both motions under submission. On December 7, 2001, Judge Margaret Neill issued her Order denying relators' Motion for Change of Venue but granting defendant Tenet's Motion to Dismiss. Exhibit P. In the Order, respondent held:

"Defendants have presented no evidence with regard to the residence of defendant Stone, plaintiff made no allegations regarding Stone's place of residence and defendants have not directed the Court to anything in the record which would support a factual finding that Stone does not reside in the City of St. Louis. Defendants have thus failed in their burden of proof on the issue of venue."

Id. at 344-345.

B. Motion to Reconsider Motion for Change of Venue.

Thereafter, relators SCM and Stone filed their Motion to Reconsider. Exhibit Q. In support, relators attached the Affidavit of Kenneth Stone. See id. In the affidavit, relator Stone asserts that he was a resident of Scott County, Missouri from the date treatment was rendered to plaintiff in July 1999 to the present.<sup>3</sup> Id. at 354. Relators SCM and Stone had not filed the affidavit prior to the hearing of relators' Motion for Change of Venue on November 16, 2001. Compare Exhibits E, F, N and exhibits attached to Exhibit O with Exhibit Q at 351-353. After plaintiff filed his response to relators' Motion to Reconsider and request to strike the Stone affidavit, relators filed their Reply thereto. Exhibits R and S. Thereafter, the trial court held a hearing to consider said motion and issued her Order denying relators' Motion to Reconsider. Exhibit T.

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<sup>3</sup>Relator Stone executed his affidavit December 13, 2001.

On February 8, 2002, relators SCM and Stone served their Petition in Prohibition in the Missouri Court of Appeals, Eastern District. The Eastern District denied relators' Petition in Prohibition. Exhibit U. On March 18, 2002, relators filed with this Court their Petition in Prohibition. This Court issued a Preliminary Writ of Prohibition ordering respondent to take no further action pursuant to State ex rel. Etter v. Neill, 70 S.W.3d 28 (Mo.App.E.D. 2002).

## **POINT RELIED ON**

**Relators S.C. Management, Inc. and Kenneth Stone, M.D., are not entitled to an Order prohibiting Respondent from taking further action other than to transfer this cause from the Circuit Court of the City of St. Louis, because Relators failed to persuade and prove to Respondent the impropriety of venue in that Relators presented Respondent with no competent evidence establishing the residence of Relator Stone prior to or at the hearing of Relators' Motion for Change of Venue and Respondent must not reconsider her Order based upon evidence not timely presented for the consideration of the trial court necessary to establish the impropriety of venue upon the grounds which Relators challenged venue.**

State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28 (Mo.App.E.D. 2002)

Scott v. Flynn, 936 S.W.2d 173 (Mo.App.E.D. 1996)

Coale v. Grady Bros. Siding and Remodeling, Inc., 865 S.W.2d 887 (Mo.App.S.D. 1993)

Richardson v. Rohrbaugh, 857 S.W.2d 415, 418 (Mo.App.E.D. 1993)

Rule 44.01(d)

## **ARGUMENT**

In the proceedings below, the trial court properly denied relators' Motion for Change of Venue because, at the time of the hearing of relators' venue motion which challenged the propriety of venue under the general venue statute, no competent evidence existed in the record establishing the residence of relator Stone, and thus, the impropriety of venue in the City of St. Louis. Furthermore, respondent properly denied relators' Motion to Reconsider because no Missouri Rule of Civil Procedure provides for the use of a motion for reconsideration or compels a trial judge to consider evidence which a party omitted in filing in support of a motion after issuance of an order.

**Relators S.C. Management, Inc. and Kenneth Stone, M.D., are not entitled to an Order prohibiting Respondent from taking further action other than to transfer this cause from the Circuit Court of the City of St. Louis, because Relators failed to persuade and prove to Respondent the impropriety of venue in that Relators presented Respondent with no competent evidence establishing the residence of Relator Stone prior to or at the hearing of Relators' Motion for Change of Venue which challenged venue under the general venue statute and Respondent must not reconsider an Order based upon evidence not timely presented for the consideration of the trial court necessary to establish the impropriety of venue upon the grounds which Relators challenged venue.**

In the case below, relators SCM and Stone challenged the propriety of venue under the general venue statute, Section 508.010 R.S.Mo. (2000). The general venue statute



provides for venue in any county in Missouri where there are several defendants and the defendants reside in different counties. However, relators failed to present respondent with any competent evidence establishing the residence of one of the defendants in this suit -- relator Stone. Because relators failed to meet their burden of proving to the trial court the impropriety of venue in the City of St. Louis pursuant to the general statute, respondent correctly denied relators' Motion for Change of Venue. Furthermore, respondent acted within that discretion granted her by the Missouri Rules of Civil Procedure in denying relators' Motion to Reconsider and request to consider the Affidavit of Kenneth Stone.

I. The Propriety of the Issuance of a Writ of Prohibition in this Case.

\_\_\_\_ “Prohibition is a discretionary writ, and there is no right to have the writ issued.” State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 856-857 (Mo.banc 2001). Prohibition will lie only where necessary to prevent an abuse of judicial discretion, to avoid irreparable harm to a party or to remedy an excess of jurisdiction. State ex rel. Eggers v. Enright, 609 S.W.2d 381, 382 (Mo.banc 1980); State ex rel. SSM Health Care St. Louis v. Neill, 78 S.W.3d 140, 142 (Mo.banc 2002). Procedurally, the burden rests with relator to establish that respondent usurped or acted in excess of her jurisdiction. Eggers, 609 S.W.2d at 382.

However, a writ of prohibition is not appropriate in this cause. Prohibition should not be used to correct or prevent the exercise of judicial power or for the correction of alleged or anticipated judicial error. Id. at 383. Here, respondent acted within the authority conferred by the Missouri Rules of Civil Procedure and as directed by the case law of this State.

II. As the Party Challenging Venue, Relators Bore the Burden of Persuading and Proving to Respondent the Impropriety of Venue on the Grounds upon which Relators Based their Venue Challenge.

In the proceedings below, relators SCM and Stone challenged the propriety of venue under the general venue statute. In Missouri, the propriety of venue is prescribed by statute. State ex rel. Elson v. Koehr, 856 S.W.2d 57, 59 (Mo.banc 1993); State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 196 (Mo.banc 1991). State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820, 822 (Mo.banc 1994). When a suit includes one or more corporations and an individual, the general venue statute governs the case. State ex rel. Smith v. Gray, 979 S.W.2d 190, 191 (Mo.banc 1998). In pertinent part, Section 508.010 provides:

“Suit instituted by summons shall, except as otherwise provided by law, be brought:

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;”                      Section 508.010(2) R.S.Mo. (2000).

Venue is determined as the case stands when brought. DePaul Health Center, 870 S.W.2d at 823; State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 857 (Mo.banc 2001). In Linthicum, this Court concluded: “a suit instituted by summons is ‘brought’ whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition.” Linthicum, 57 S.W.3d at 858.

As the party challenging venue, relators SCM and Stone possessed the burden below of establishing through competent evidence the impropriety of venue in the City of St.

Louis as the case stood on the date plaintiff joined relator Stone. The party asserting improper venue possesses the burden of persuasion and proof. Coale v. Grady Bros. Siding and Remodeling, Inc., 865 S.W.2d 887, 889 (Mo.App.S.D. 1993); State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28, 31 (Mo.App.E.D. 2002). In Coale, the Southern District affirmed the denial by the trial court of defendant's motion to dismiss for improper venue. Id. There, defendant challenged venue but failed to present any evidence to the court in support of its motion. Id. at 888-889. Based upon the failure of the defendant to present evidence, the appellate court held that defendant failed to demonstrate the impropriety of venue. Id.

From the outset, relators asserted the general venue statute governs venue in this case. Exhibit E, ¶¶17, 24; Exhibit G at 70; Exhibit H, ¶15. Persuaded by relators, respondent analyzed venue under Section 508.010. Exhibit P at 344. However, relators failed to put *any* competent evidence before the trial court demonstrating the residence of relator Stone. See Exhibits E, F and N. Recognizing that relators failed to meet the burden of proving the impropriety of venue, respondent denied the venue motion. Exhibit P at 345.

A. Relators Failed to put Competent Evidence before the Trial Court Establishing the Residence of Relator Stone.

The residence of relator Stone was not “clearly before the Trial Court.” Relators’ Brief at 12. In fact, relators failed to file any competent evidence regarding the residence of relator Stone with respondent prior to the hearing of the venue motion.

Contrary to the relators’ claim, allegations and evidence put forth by relators below

prove insufficient to establish the residence of relator Stone on the date plaintiff brought the pending suit. In their Petition in Prohibition, relators point this Court to various assertions put forth by relators in their various pleadings, including assertions in the venue motion and relators' respective Answers alleging that relator Stone "is a resident of Scott County, Missouri." See Petition in Prohibition, ¶15; Suggestions at 7; Exhibit E, ¶¶21, 25; Exhibit G at 70, Exhibit K at 88-89; Exhibit H at 75; Exhibit J at 84. However, unsworn statements made by counsel in the pleadings are not evidence of the facts asserted. State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 69 (Mo.App.S.D. 1997).

In fact, relators failed to file any affidavits or other competent evidence with the Court prior to the hearing of their venue motion. Answers to interrogatories attached to relators' Reply Memorandum do identify the "last known address" of relator Stone as "108 Greenbriar, Sikeston, MO 63801." See Exhibit N at 246. However, such information fails to demonstrate the residence of relator Stone on the date plaintiff filed his Amended Petition joining relator as a party defendant. As such, such evidence does not prove the impropriety of venue under Section 508.010.

B. As the Party Challenging Venue, Relators Possessed the Burden to Prove Allegations Put Forth in their Motion for Change of Venue.

Nevertheless, relators argue that this Court should hold that a trial court may not deny a venue motion on a basis upon which the moving party challenges venue where plaintiff did not plead such basis in his petition. Relators' Brief at 13-14. In support, relators cite this Court to a recent decision of the Eastern District, State ex rel. Etter, Inc. v.

Neill. In Etter, the Eastern District held defendants had not waived venue where defendants adduced evidence in opposition to the basis of venue specifically pled by plaintiff in his petition. Etter, 70 S.W.3d at 32.

In that case, plaintiff alleged the defendant ad litem to be a resident of the City of St. Louis. No other nexus to St. Louis City existed. And, the well established law of this State directs that the residence of a defendant ad litem does not control for venue purposes. Id. at 30-31. In denying transfer, the trial court did not find that the defendant ad litem's residence provided a basis for venue. Id. at 30. Rather, the court found that moving party had failed to adduce evidence that Etter, Inc., a dissolved corporation, had stopped doing business or that Etter did not maintain an office or agent in St. Louis City for its usual and customary business. Id. The Eastern District concluded that the trial court could not fault an opposing party for only adducing evidence in opposition to the basis pled. However, that Court did not suggest that the moving party is not required to provide evidence in support of its own assertions put forth in a motion challenging venue. Id. at 32.

Here, unlike Etter, respondent considered the issue of venue and the sufficiency of evidence put forth by relators in support of their challenge under the basis which relators explicitly challenged venue. In fact, relators expressly asserted to the trial court that Section 508.010 governed venue here. Exhibit E, ¶17. Relators – unlike the defendants in Etter – chose the field of battle – Section 508.010. See id.; Exhibit N. Even after plaintiff filed his Supplemental Suggestions in Opposition, relators failed to supplement their venue motion with competent evidence demonstrating the residence of relator Stone. See Exhibit

N. Unlike Etter, no surprise occurred when the trial court analyzed the propriety of venue and the sufficiency of proof put forth by relators under the general venue statute. In contrast to Etter, relators failed in the burden of proof with regard to their own assertions contained in relators' venue motion.

Having pled venue to be improper pursuant to Section 508.010, relators possessed the burden to prove to the trial court the basis for such contention. Thus, relators failed in their burden of proof by omitting to file affidavits or other competent evidence establishing the residence of each defendant on the date plaintiff amended his petition joining relator. See Exhibits E, F and N. Contrary to relators' claim, the trial court did not require relators to put forth proof on "all conceivable possibilities of venue as to any defendant." Relators' Brief at 16. Rather, respondent held that relators failed to present sufficient evidence to the court establishing the impropriety of venue under the basis which relators claimed venue to be improper. Compare Etter, 70 S.W.3d at 32 and Exhibit P at 344-345. Respondent merely held relators to that burden assigned them as parties challenging venue – the burden of persuasion *and proof*.

Respondent admits that plaintiff did not allege relator Stone to be a resident of any particular Missouri county. However, plaintiff is not required to plead venue.<sup>4</sup> Wood v.

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<sup>4</sup>Relators apparently assert that this Court requires plaintiff to plead venue. Relators' Brief at 13. In support, relators cite State ex rel. Willman v. Marsh, 720 S.W.2d 939 (Mo.banc 1986). Willman does not support such contention. In Willman, this Court merely found that facts pled by plaintiff in his petition were sufficient to establish a *basis for venue* in

Wood, 716 S.W.2d 491, 494 (Mo.App.S.D. 1986). Here, relators SCM and Stone put the residence of relator Stone at issue by challenging the propriety of venue. Exhibit E, ¶¶17, 24; Exhibit G at 70; Exhibit H, ¶15. As such, relators possessed the burden of proving the impropriety of venue. See Coale, 865 S.W.2d at 889; Etter, 70 S.W.3d at 31.

Any mandate requiring plaintiff to specifically plead in his petition a basis of venue would shift the burden previously placed by Missouri courts from the party challenging venue to plaintiff. Such requirement would place on plaintiff the burden of proving venue – an obligation squarely placed previously by Missouri courts on the shoulders of the challenging party. Coale, 865 S.W.2d at 889; Etter, 70 S.W.3d at 31. As such, this Court should quash its preliminary writ of prohibition.

III. Respondent Properly Exercised Discretion Granted the Trial Court by the Missouri Rules of Civil Procedure in Denying Relators’ Motion to Reconsider.

Because no rule provides for the use of a motion for reconsideration, respondent acted within her judicial power in denying the motion of relators’ to reconsider the ruling

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the context of a motion to dismiss. Willman, 720 S.W.2d at 941. This Court did not there hold that venue would not lie absent facts pled by plaintiff in his petition sufficient to establish the propriety of venue. Id. at 940-941.

of the trial court denying relators' Motion for Change of Venue. See Exhibits Q and T. Additionally, respondent acted within that discretion granted her by Rule 44.01(d) in denying the request of relators to consider the Affidavit of Kenneth Stone first presented to the court after hearing and issuance of the court's order denying the venue motion. Rule 44.01(d).

No rule provides for the utilization of a motion to reconsider as advocated by relators here. According to the Eastern District, a "motion for reconsideration [has] no legal effect as no Missouri rule provides for such a motion." Scott v. Flynn, 936 S.W.2d 173, 174 (Mo.App.E.D. 1996). The only mention of a motion to reconsider in the Missouri Rules of Civil Procedure is a command that such motions shall *not* be filed. Koerber v. Alendo Bldg. Co., 846 S.W.2d 729, 730 (Mo.App.E.D. 1992); See Rule 83.04. In fact, the only purpose for which Missouri courts have accepted a motion to reconsider is as a misnomer for a motion for new trial. Koerber, 846 S.W.2d at 730; In re McDonald Revocable Trust v. McDonald, 942 S.W.2d 926, 931, fn 6 (Mo.App.S.D. 1997). Because Missouri law does not recognize the motion to reconsider, denial of such a motion serves only as "a nullity," preserving nothing for appellate review. Scott, 936 S.W.2d at 174.

Further, there exists no statute or judicial decision requiring respondent to consider a motion for reconsideration where the court previously heard argument, accepted briefs, and issued an order on a previous motion based upon the same or similar facts and circumstances. According to this Court, a trial court may refuse to hear a motion which is substantially the same as one previously ruled upon. State ex rel. McCarter v. Craig, 328



S.W.2d 589, 592 (Mo.banc 1959). In fact, when a court makes a ruling and a party moves that court to rehear the same upon substantially similar facts, the initial ruling is conclusive, serving to bar further rehearing unless the court grants leave to present the matter again. State ex rel. L.J. Mueller Furnace Co. v. Buckner, 229 S.W. 392, 393 (Mo.App. 1921).

Here, the Motion to Reconsider the Motion for Change of Venue filed by relators is “a nullity,” preserving nothing for the review of this Court. In the motion, relators moved respondent “to reconsider their *Motion for Change of Venue*.” Exhibit Q at 351. Relators again challenged venue under Section 508.010, incorporated by reference the venue motion, memorandum in support, and reply memorandum previously filed by relators, and, for the first time, submitted an affidavit referencing the residence of relator Stone. Id. at 351-354. Essentially, relators placed before the court a second time their motion challenging venue under the general venue statute, a motion which respondent previously heard. See id. Having previously heard argument, accepted briefs, and issued an order, respondent permissibly acted when she denied to reconsider relators’ venue motion and her order.

Additionally, in denying relators’ request that the court consider the Stone Affidavit, respondent merely exercised that discretion provided her by the Missouri Rules of Civil Procedure. Pursuant to Rule 44.01(d), a court may not properly consider an affidavit in support of a motion unless the affidavit is served prior to hearing of the motion. Stavrides v. Zerjav, 848 S.W.2d 523, 530 (Mo.App.E.D. 1993); Kennedy v. Empire Gas Co., Inc., 756 S.W.2d 945, 947 (Mo.App.S.D. 1988). Rule 44.01(d) provides, in pertinent part:

“When a motion is supported by an affidavit, the affidavit shall be served with the motion; and except as otherwise provided by law or rule in connection with a motion for a new trial, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.” Rule 44.01(d).<sup>5</sup> In Empire Gas, the Court of Appeals, Southern District found that while the trial court properly considered an affidavit served with a motion to dismiss or quash service, the Court “conceded that the affidavit filed by [the moving party] the day its motion was heard could not properly be considered.” Empire Gas, 756 S.W.2d at 947. Likewise, in Stavrides, the Missouri Court of Appeals, Eastern District, held that the trial court did not err in sustaining an objection of a party to an affidavit filed on the day of the hearing by a party opposing a motion to dismiss. Stavrides, 848 S.W.2d at 530.<sup>6</sup>

Likewise, in a review of an order granting summary judgment, the Eastern District affirmed the discretion of a trial court to deny leave to file proof following the hearing of the motion. See Richardson v. Rohrbaugh, 857 S.W.2d 415, 418 (Mo.App.E.D. 1993). In

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<sup>5</sup>Relators cite Etter in support of their assertion that respondent erred in failing to consider the Stone Affidavit. Respondent notes that the Eastern District did not address the applicability of Rule 44.01(d) in that case. See Etter, 70 S.W.3d, 30-32.

<sup>6</sup>See also Mary Coffey, Mo. Prac., Civil Rules Practice, Section 55.28-1 (2<sup>nd</sup> Ed.). In the section titled “Evidence Allowed on Motions,” Ms. Coffey states: “Under Rule 44.01(d) any affidavit filed in support of a motion must be served at least one day before the hearing. Otherwise the affidavit may not be considered.”

Richardson, the Eastern District stated that affidavits filed by a party opposing a motion for summary judgment nearly a month after the hearing “will clearly not be considered as part of the record on appeal.” “Absent leave of court or an agreement between the parties to file a late opposing affidavit,” the Court continued, “we abide by the clear mandate of the rule requiring filing before the date of the hearing on the motion.” Id. at 418. According to this Court, affidavits filed as late as the date of the hearing are not timely filed and, therefore, will not be considered as part of the record on review. Id.

Here, respondent acted within that discretion granted her by Rule 44.01(d) when she denied relators leave to file the Affidavit of Kenneth Stone. Relators SCM and Stone first moved the trial court for permission to file proof regarding the residence of relator Stone well after the hearing of relators’ Motion for Change of Venue. Exhibit Q. Relators filed their Motion to Reconsider moving the trial court to consider the Stone Affidavit 20 days *after the Court issued its Order* denying the venue motion and 41 days *following the hearing* of the motion. See Exhibits P and Q. At no time did plaintiff agree to permit relators to file the Stone Affidavit. Plaintiff objected to the filing of the Stone Affidavit in his Response to relators’ Motion to Reconsider, requesting the Court “strike, pursuant to Rule 44.01(d), the Affidavit of Kenneth Stone, M.D.” Exhibit R. In such circumstance, the trial court -- in a permissible exercise of her discretion under Rule 44.01(d) -- properly denied to consider the Stone Affidavit.

Furthermore, to allow a party challenging venue to supplement the record in an untimely manner would undercut the purpose of this Court’s rules directing that the defense

of improper venue be clearly and promptly asserted so that the litigation may proceed in an appropriate venue. See Rule 51.045; State ex rel. Johnson v. Griffin, 945 S.W.2d 445, 447 (Mo.banc 1997). In her order denying the venue motion, respondent determined venue under the grounds advocated by relators (Section 508.010) and based her holding on (the insufficiency of) evidence put forth by relators in both their initial and supplemental venue motions. Exhibit P at 344-345; See Exhibit E at 34-59; Exhibit O at 241-340. Relators expressly asserted to the trial court that Section 508.010 governed venue here. Exhibit E, ¶17. Indeed, the venue motion evidences the recognition of relators of the necessity to demonstrate that no defendant – including relator Stone – resides in St. Louis City. See Exhibit E, ¶21. Relators failed in the burden of proof with regard to their own assertions contained in relators' venue motion. Neglecting to file any competent evidence establishing the residence of relator Stone prior to the hearing of their venue motion, relators SCM and Stone failed to meet their burden of proof. Rule 44.01(d) permits respondent to deny a request to consider an affidavit untimely filed following receipt of an adverse order. As such, respondent acted within the discretion provided her and permissibly denied relators' motion to transfer this cause from the Circuit Court of the City of St. Louis.

## **CONCLUSION**

WHEREFORE, for the reasons set forth herein, respondent the Honorable Margaret M. Neill, Judge of the Missouri Circuit Court, Twenty-Second Judicial Circuit, respectfully requests this Court make and enter its Order quashing its Preliminary Order in Prohibition and remanding this cause to the Circuit Court of the City of St. Louis for reinstatement and further proceedings and for such other and further relief as this Court deems just and proper under the circumstances.

RESPECTFULLY SUBMITTED,

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**CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME**

**COURT RULE 84.06(b) AND RULE 84.06(g)**

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on the word processing program by which it was prepared, contains 6,057 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the diskette filed herewith containing the Brief of Respondent is electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and its virus-free.

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**CERTIFICATE OF SERVICE**

A true copy of the foregoing has been served upon defendants by depositing the same in the United States mail, postage pre-paid, this 14<sup>th</sup> day of August, 2002, addressed to the attorneys of record herein: Mr. Joseph C. Blanton, Jr. and Bryan E. Nickell, Attorneys at Law, 219 South Kingshighway, P.O. Box 805, Sikeston, Missouri, 63801, and Mr. Ted R. Osburn, Attorney at Law, 1359 North Mount Auburn Road, Suite D, Cape Girardeau, Missouri, 63701.

CC: Margaret M. Neill, Circuit Court Judge